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IN THE

Supreme Court of the United States

BRANDON MAYFIELD, an individual, MONA MAYFIELD, an individual, and SHANE MAYFIELD, SHARIA MAYFIELD, and SAMIR MAYFIELD, individuals, by and through their *guardian ad litem* Mona Mayfield,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

The government, in its brief in opposition, does not deny the following:

- "[T]he Mayfields are in no way connected to [the terrorist attack on Spanish soil in 2004] that prompted the Foreign Intelligence Surveillance Act ["FISA"] searches and seizures" at issue here, and responsible parties have long been apprehended. (Pet. 2-3.)

- The government nonetheless retains, among other things not disclosed to the Mayfields, "photocopies or photographs of documents from confidential client files in Mayfield's law office, summaries and excerpts from the computer hard drives from the Mayfield law office and plaintiffs' personal computers at home, analysis of plaintiffs' personal bank records and bank records from Mayfield's law office, analysis of client lists, websites visited, family financial activity, summaries of confidential conversations between husband and wife, parents and children, and other private activities of a family's life within their home." (*Id.* at 5) (quoting App. 20a-21a).

- "These materials, in a derivative form, have been distributed to various government agencies." (*Id.* at 5) (quoting App. 20a-21a).

- The government has agreed that "if such a declaratory judgment is entered with respect to one or both of such provisions [of FISA] and becomes final and not subject to further judicial review, the United States shall not use

> such provision[s] with respect to the plaintiffs." (App. 79a-80a.)

What the government does say in response to the first question presented is that the Mayfields are wrong *on the merits*: the government does not "have to destroy the derivative FISA materials in order to conform to the [District Court's] declaration" (Br. in Opp'n 10; *see id.* at 9) because, in the government's and the Ninth Circuit's view, the government has the power to retain indefinitely sensitive materials in derivative form in which the Mayfields unquestionably have a possessory interest—even though it has *never* articulated a law enforcement justification for the continued retention. This response does not support the government's contention that this Court should deny review; rather, it reinforces the Mayfields' point that this Court's definitive guidance is sorely needed to resolve an important question on which the courts of appeals are conflicted: whether the Fourth Amendment is relevant to the reasonableness of a decision to refuse to relinquish seized property that the government has no articulable reason to retain. (*See* Pet. 10-16.)

Neither should the government's response to the second question presented dissuade this Court from accepting review. The government, for instance, stresses that the Mayfields "bargained away" the opportunity to request coercive relief. In its view, then, the Court of Appeals' conclusion that a declaration, standing alone, could not satisfy Article III redressability requirements is "fact-bound." (Br. in Opp'n 7.) But, as the government states elsewhere, the Court of Appeals also did not believe that the District Court had the power to issue

coercive relief *sua sponte*. (*Id.* at 12 & n.6; *see also* App. 74a) (noting "the absence of any authority on which the district court could rely to insist *sua sponte* that the derivative materials be returned or destroyed").[1] Thus, the Court of Appeals' conclusion that a declaration, if not coupled with coercive relief, could not redress the Mayfields' injuries does not hinge on the inability of the Mayfields to seek an injunction. Rather, it hinges on a deeply flawed understanding of a *district court's authority* to "declare the rights and other legal relations of any interested party seeking such a declaration, *whether or not further relief is or could be sought*." 28 U.S.C. § 2201 (emphasis added). Such a declaration of rights, standing alone, satisfies Article III redressability requirements in this case. The decision below thus undermines a core purpose of the Declaratory Judgment Act—to vest district courts with broad and flexible authority to remedy federal rights—and merits this Court's review.

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[1] The government is correct that the better reading of the Court of Appeals decision is that the Court of Appeals did not think the District Court could order such relief. (Br. in Opp'n 12 & n.5.) But it is wrong to suggest that the District Court shared this view. (*See id.*) The District Court's decision certainly does not compel that conclusion. What the decision suggests is that the District Court did not believe coercive relief was even necessary because the government would abide by the declaration, and the declaration itself was sufficient to redress the harms alleged. (App. 21a) ("If . . . the court enters a declaratory judgment finding the challenged portions of the Patriot Act unconstitutional, it is reasonable to assume that the Executive Branch of the government will act lawfully and make all reasonable efforts to destroy the derivative materials"); (*id.* at 23a) ("a declaratory judgment striking the challenged sections of FISA will require the Executive Branch to destroy or otherwise eliminate the derivative materials").

ARGUMENT

I.

The government plainly disagrees with the Mayfields as to whether it "would [] have to destroy the derivative FISA materials in order to conform to the [District Court's] declaration." (Br. in Opp'n 10.) It claims that it would not for the sole reason that it has the power to seize and keep indefinitely illegally acquired materials in derivative form in which the Mayfields have a possessory interest. It claims to have that power but it does not articulate a reason for retaining these materials, and no reason is apparent.

Whether it in fact has that authority is an issue raised by the first question presented. The Mayfields argued in their petition that,

> as an issue of great national importance, the Court of Appeals' conclusion that the Mayfields lack standing to claim the protections of the Fourth Amendment—here, for the return of materials containing sensitive information in which they have a possessory interest—is, in effect, a conclusion that the Fourth Amendment does not bar the government from keeping indefinitely property it has seized illegally, even where it has asserted no justification for doing so.

(Pet. 6.) They further explained that the Courts of Appeals are divided on this question. (Pet. 10-16.) Whereas several courts of appeals decisions support the government's view that the Fourth Amendment

is utterly irrelevant to the reasonableness of a decision to refuse to relinquish seized property once the government has no need for it, (Pet. 13 (citing *Lee v. City of Chicago*, 330 F.3d 456 (7th Cir. 2003))), others support the Mayfields' view that the Fourth Amendment is relevant and requires the return of property in which a person has a lawful possessory interest once the government no longer has a competing interest in retention (Pet. 11-12).

The government, in its response, fails to discuss any of these cases. Instead, it defends the Court of Appeals' decision on the merits. It argues, first, that the Court of Appeals is correct that the government would not have to divest itself of these materials (Br. in Opp'n 9) (stating that the Court of Appeals correctly rejected this "assumption") (citing App. 71a-73a); and second, "[*b*]*ecause*" the government has no such obligation, the Court of Appeals, in its view, correctly concluded that a declaratory judgment is not likely to cause the government to return the materials (*id.* at 10) (emphasis added). This assumption, the government insists, is sound because "[t]his Court has repeatedly made clear that, outside the context of criminal trials, the government is generally free to use evidence obtained in an unlawful search." (Br. in Opp'n 9 (citing *Pennsylvania Bd. of Prob. & Parole v. Scott*, 524 U.S. 357 (1998))). It notes, by way of example, that this Court has permitted the government to retain unlawfully obtained materials for use against an alien in civil immigration proceedings, and that such evidence may be used in grand jury proceedings. (*Id.* (citing *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1034, 1050 (1984), and *United States v. Calandra*, 414 U.S. 338, 347-52 (1974))).

Of course, these examples only serve to prove the Mayfields' point: whether the government may retain unlawfully obtained materials for future use must be tested against Fourth Amendment standards. (*See* Pet. 16.) Thus, for instance, in *Lopez-Mendoza*, 468 U.S. at 1034, the Court weighed the "costs and benefits . . . [of] applying the exclusionary rule in civil deportation hearings held by the INS." In *Calandra*, 414 U.S. at 349, "in deciding whether to extend the exclusionary rule to grand jury proceedings," the Court "weigh[ed] the potential injury to the historic role and functions of the grand jury against the potential benefits of the rule as applied in this context." The government in those cases articulated a specific law-enforcement need for retaining (and using) unlawfully obtained evidence.[2]

In contrast, here the Court of Appeals did not attempt "to find the proper balance between [] law enforcement interests [in retention] and the general citizen's interest in her property." *Lee*, 330 F.3d at 473 (Wood, J., concurring); *see, e.g.*, *Sovereign News Co. v. United States*, 690 F.2d 569, 677 (6th Cir. 1982) (balancing a business owner's property interest in copies of business records seized during a criminal investigation with the government's interests in retention, and concluding "when the government has held the copies for a 'reasonable time' and has no investigations in progress, it must return the copies as well as the originals") (citation omitted). It did not even ask why, after six years, the government continues to retain a vast trove of private information about the Mayfields, including

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[2] The government does not state that it is retaining these materials so that it can use them for the purposes contemplated by these cases.

photographs of the interior of the Mayfields' home, summaries of their intimate conversations, digital copies of their home and work computers, including websites visited, as well as documents from Mr. Mayfields' legal office, which are confidential and privileged. Instead, the Court of Appeals simply "assum[ed]" (Br. in Opp'n 9) that "it is not unlawful for the government to retain and use materials obtained through unconstitutional searches (or, in the case of derivative materials, as a result of such searches)." (Br. in Opp'n 10.) And, on this basis, it concluded that the declaration would not remedy the Mayfields' injuries.

To the contrary, a declaration is likely to remedy the Mayfield's injuries. As the Mayfields have explained (Pet. 7-8), the declaration would address the legality of searches and seizures under FISA. The legality is a consideration material to whether the retention is reasonable, because it speaks to which party may have a superior interest in the property. (*See* Pet. 7.) Where the retention is unreasonable, *i.e.*, where the interests in return outweigh the interests in retention, the Fourth Amendment itself requires the government to return the property. Thus a declaration of unconstitutionality would "likely" redress the Mayfields' injuries.

During this time in our history when concerns about terrorism may result in erroneous searches and arrests, as was visited upon the Mayfields, it is critically important that this Court provide guidance to the lower courts about the rights of law-abiding citizens wrongfully accused. Here, the Ninth Circuit's decision strikes the wrong balance and is contrary to decisions of several courts of appeals; it is

at odds with this Court's precedents, including *United States v. Place*, 462 U.S. 696 (1983);[3] and it raises a significant constitutional question meriting this Court's review. *See Lee*, 330 F.3d at 473 (Wood, J., concurring) ("[T]the protection of private property is a high enough value in the Constitution that I would hesitate long before I concluded that there were no constitutional restrictions on the State's power to seize property and keep it.").

II.

This Court should also hear the second question presented. The Court of Appeals' decision, if not reviewed, would undermine the flexibility that Congress intended in the Declaratory Judgment Act ("DJA"). As the petition demonstrates, Congress enacted the DJA to provide district courts with a more palatable alternative to the "strong medicine" of issuing injunctions against state and federal officials. (Pet. 29-32.) The Act is thus premised on the wisdom of relying on those officials to accept the court's final determination as to the constitutionality of the law and uphold the petitioner's federal rights. (*Id.* at 31.) This is, in fact, precisely the District Court's assessment. (*See* App. 21a.)

The issuance of a declaration concerning the Mayfields' constitutional rights would significantly increase the likelihood that they would obtain relief. (*See* Pet. 31.) Contrastly, allowing the lower court's

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[3] *Cf.* Advisory Committee's 1989 Notes on Fed. R. Crim. P. 41 (citing *United States v. Place* in support of the proposition that "reasonableness under all the circumstances must be the test when a person seeks to obtain the return of property"); (*see also* Pet. 16-18.).

decision to stand would undermine the flexibility that Congress intended to provide district courts with when it enacted the DJA. (*Id.* at 30.)

As the Mayfields have explained, the Court of Appeals erred in requiring them to show that the declaratory judgment "guarantee[s]" relief (Pet. 24), in contravention of the standard established by this Court requiring a showing of a "significant increase in the likelihood that the plaintiff would obtain relief." (*Id.* at 24-25 (quoting *Utah v. Evans*, 536 U.S. 452, 464 (2002))).

The government disputes this characterization, arguing that the Court of Appeals correctly applied the "likelihood" test. (Br. in Opp'n 10-11.) Yet the government, like the Court of Appeals, insists that the Mayfields lack standing without an injunction to "enforce" the declaratory judgment and "require" the government to return or destroy the derivative materials. (Br. in Opp'n 7 & 10.)

The petition, however, demonstrates that a declaratory judgment would increase the likelihood of redress, which is all that is required. None of the Mayfields' asserted bases for standing are unique to the facts of this case; rather, they call upon the Court to give effect to the broad purposes of Congress in enacting the DJA and to uphold the inherent authority of the district court in carrying out those aims.

A.

For instance, a declaratory judgment would increase the likelihood that the District Court would, in the event of non-compliance, *sua sponte* enter an

injunction resulting in the right of return or destruction of the materials. The Court of Appeals did not believe the District Court had this power. *See supra* at p. 3 n.1. But that cannot be correct: Congress expressly provided in the Declaratory Judgment Act that a district court retains jurisdiction over the case after issuing a declaration of rights so that the court can subsequently issue an injunction in order to effectuate its prior judgment. (Pet. 34.) Although the government disagrees (Br. in Opp'n 12), it fails to address *Starter Corp. v. Converse, Inc.*, 170 F.3d 286, 298-99 (2d Cir. 1999), which is cited in the petition (at 35). There, the Second Circuit upheld the district court's exercise of its discretionary authority under the DJA "to issue an injunction in order to preserve the benefits obtained by the prevailing party in [a] declaratory judgment action." The fact that the Mayfields agreed that *they* would not seek injunctive relief thus does not deprive the *district court* of its discretionary authority to act.

B.

An additional basis for standing is provided in the stipulation between the Mayfields and the government. The government agreed that if the Mayfields obtained an adverse declaratory judgment with respect to the constitutionality of §§ 1804 or 1823, and the judgment became final and not subject to further judicial review, the government "would not subject petitioners to any further electronic surveillance or physical searches on the basis of those statutory provisions." (Br. in Opp'n 4.)

The government argues that this basis for standing is "irrelevant" "because petitioners never

presented it to the court of appeals" and thus it did not pass on it. (Br. in Opp'n 14.) It was raised, however, as the government itself notes, in the Amended Complaint. (*Id.* at 14 n.8.) In addition, the District Court made note both of the Mayfields' allegations that they "fear future uses of FISA" against them and the government's response that that the "declaratory judgment would protect plaintiffs against future searches or surveillance targeting them under a struck-down provision." (App. 20a.) Similarly, the Court of Appeals stated that the Mayfields' purpose in seeking a declaratory judgment was "1) to prevent future uses of FISA against Mayfield; and 2) to force the government to return or destroy" the derivative materials." (App. 67a.) It noted that the government's position was that the "possibility of [such] future injuries" was speculative. (App. 68a.) Because the Court of Appeals found that the Mayfields satisfied the redressability requirement based on the government's retention of the materials, it did not address this separate basis for standing. (*See* App. 68a-69a.)

Such a commitment on the part of the government is a substantial benefit the Mayfields stand to gain if they succeed in obtaining a final judgment on their Fourth Amendment claims. It is part of the bargain that the government otherwise relies on.

The government now asserts that its commitment to the Mayfields is worth little, because, in view of the statutory safeguards surrounding the issuance of a FISA order, it is not likely to target the Mayfields in the future. (*See* Br. in Opp'n 14 n.8.) To the contrary, it is highly likely that the Mayfields would obtain the benefit they seek if they obtain a

declaratory judgment, because the government itself has promised that it will effectively enjoin itself from using FISA with respect to the Mayfields in the future if the declaration properly issues. (*See* App. 80a.)

Consequently, the Mayfields "personally would benefit in a tangible way" from the declaratory judgment, *Warth v. Seldin*, 422 U.S. 490, 508 (1975), and thus they satisfy the redressability requirement for Article III standing.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

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Respectfully submitted,

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